रजिस्ट्री सं. डी.एल.- 33004/99 REGD. No. D. L.-33004/99

भारत का राजपत्र
The Gazette of India

सी.जी.-डी.एल.-अ.-11062021-227521
CG-DL-E-11062021-227521

असाधारण
EXTRAORDINARY

भाग II—खण्ड 3—उप-खण्ड (iii)
PART II—Section 3—Sub-section (iii)

प्राधिकार से प्रकाशित
PUBLISHED BY AUTHORITY

सं. 32] नई दिल्ली, बृहस्पतिवार, जून 10, 2021/ज्येष्ठ 20, 1943
No. 32] NEW DELHI, THURSDAY, JUNE 10, 2021/JYAISHTHA 20, 1943

भारत निर्वाचन आयोग

अधिसूचना

नई दिल्ली, 31 मई, 2021

आ.अ. 34(अ).—लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 106 (क) के अनुसरण में, भारत निर्वाचन आयोग, वर्ष 2019 की निर्वाचन याचिका सं. 2 में केरल उच्च न्यायालय, एरनाकुलम के दिनांक 23.11.2020 के निर्णय/आदेश को एतद्द्वारा प्रकाशित करता है।

[फा. सं. 82/केरल-लो.स./2/2019]

आदेश से,

अरविन्द आनन्द, सचिव

ELECTION COMMISSION OF INDIA

NOTIFICATION

New Delhi, the 31st May, 2021

O.N. 34(E).—In pursuance of Section 106(a) of the Representation of the People Act, 1951(43 of 1951), the Election Commission of India hereby publishes the Judgment/Order dated 23.11.2020 of the High Court of Kerala, Ernakulum in the Election Petition No. 2 of 2019.

[F. No. 82/KL-HP/2/2019]

By order,

ARVIND ANAND, Secy.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 23RD DAY OF NOVEMBER 2020 / 2ND AGRAHAYANA, 1942

El.Pet.No.2 OF 2019

PETITIONER:

ANANDAGOPAN.K, AGED 72 YEARS, S/O LATE KESAVA PANICKER, CHAITHANYA,

VALLAMKULAM P.O., ERAVIPEROOR, PATHANAMTHITTA-689 542.

BY ADVS. SRI.V.PHILIP MATHEW SRI.E.RADHAKRISHNAN SRI.JEPH JOSEPH

RESPONDENT:

ANTO ANTONY, AGED 62 YEARS, S/O.ANTONY, RESIDENT OF 12/710A(11/287), SKYLINE PALM SPRING VILLA,KALATHIPADY, VADAVATHOOR P.O., KOTTAYAM-686 010.

R1 BY ADV. SRI.S.SREEKUMAR (SR.) R1 BY ADV. SRI.P.MARTIN JOSE

R1 BY ADV. SRI.P.PRIJITH

R1 BY ADV. SRI.THOMAS P.KURUVILLA R1 BY ADV. SRI.R.GITHESH

R1 BY ADV. SRI.MANJUNATH MENON R1 BY ADV. SHRI.HARIKRISHNAN S.

R1 BY ADV. SRI.SACHIN JACOB AMBAT R1 BY ADV. SMT.HANI P.NAIR

R1 BY ADV. SRI.AJAY BEN JOSE

R2 BY SRI.MURALI PURUSHOTHAMAN, SC,ELE.COMMN.

THIS ELECTION PETITION HAVING BEEN FINALLY HEARD ON 18-11-2020, THE COURT ON 23-11-2020 DELIVERED THE FOLLOWING:

P.B. SURESH KUMAR, J.

Election Petition No.2 of 2019

Dated this the 23rd day of November, 2020

JUDGMENT

This is an election petition under the Representation of the People Act, 1951 ('the Act') calling in question the election of the respondent to the Seventeenth Lok Sabha from Pathanamthitta Parliamentary Constituency.

2. The election to the Seventeenth Lok Sabha was announced by the Election Commission of India on 10.03.2019. The election was notified later on 28.03.2019. The last date for filing nominations was 04.04.2019. The polling was held on 23.04.2019. The votes were counted on 23.05.2019 and the respondent, who was the candidate of the United Democratic Front (UDF), was declared elected by a margin of 44,243 votes over his immediate rival Veena George of the Left Democratic Front (LDF).

3. The petitioner is an elector in the Pathanamthitta Parliamentary Constituency. He was the Secretary of the election committee of LDF in the said constituency. According to the petitioner, for the various grounds mentioned in the election petition, the election of the respondent is liable to be declared void.

4. Along with the written statement, the respondent preferred I.A No.5 of 2019 seeking orders for hearing the contention taken by him in the written statement as to the maintainability of the election petition as a preliminary issue. In the affidavit filed in support of the said interlocutory application, it is alleged by the respondent that the allegations in the election petition do not make out a cause of action for the relief claimed in the election petition and therefore the election petition is liable to be rejected under

Order VII Rule 11 of the Code of Civil Procedure. In the light of the said interlocutory application, the maintainability of the election petition was heard as a preliminary issue and in terms of the order dated 06.11.2019, this Court held that the election petition is maintainable. However, in terms of the said order, this court struck down paragraphs 5 to 19 and 25 of the election petition, holding that the averments in those paragraphs do not make out a cause of action for the relief claimed in the election petition.

5. The allegations in the remaining paragraphs of the election petition are that the wife of the respondent, Smt. Grace Anto is a follower of Pentecostal faith and is associated with that community; that Smt. Grace Anto attended several meetings of the Pentecostal Church on various dates at different places after the respondent submitted nomination paper, for canvassing votes for the respondent in the name of their religion and community; that on 07.04.2019, Smt. Grace Anto made an appeal in the course of her speech at IPC Prayer Centre, Thiruvalla to cast vote on the ground of religion; that persons reposing faith in Pentecostal Church are styling themselves as persons "born again" and that in the course of the said speech, Smt. Grace Anto emphasized the need to elect a person who is born again to the Parliament. It is alleged in the election petition that one Sri. K. O. Joseph who heard the said speech informed the petitioner about the same and the petitioner also found the video of the said speech in YouTube in the search conducted thereupon. It is also alleged by the petitioner that one Sri. Alen Mathew Thomas downloaded the video of the speech of Smt. Grace Anto from YouTube, copied the same in a compact disc and gave to the petitioner on his request. It is stated in the election petition that the compact disc produced along with the election petition as Annexure-K is the compact disc handed over to the petitioner by Sri. Alen Mathew Thomas. It is also stated by the petitioner in the election petition that Annexure-L to the election petition is the typewritten version of the speech rendered by the wife of the respondent on 7.4.2019. The case set out by the petitioner in the election petition is that the said speech of Smt. Grace Anto which was made with the consent of the respondent would amount to "corrupt practice" falling within the scope of Sections 123(2) and 123(3) of the Act.

6. In reply to the allegations in the election petition as reproduced in paragraph 5 above, the respondent has stated in the written statement that Smt. Grace Anto did not participate in any of the meetings of the Pentecostal Church for canvassing votes for him in the name of religion or community; that Smt. Grace Anto has not canvassed votes for him in the name of religion or community in any election; that Annexure-L is the speech rendered by Smt. Grace Anto on 01.02.2019 in connection with "Charisma Crusade 2019", a programme organized by IPC Prayer Centre, Thiruvalla from 28.01.2019 to 03.02.2019; that it was not a speech made by Smt. Grace Anto on 07.04.2019 as alleged by the petitioner; that Annexure-L speech does not show that Smt. Grace Anto had canvassed votes in the name of the religion or community and that at any rate, the said speech being one rendered long before the election notification, the same would not make out a case of "corrupt practice" falling within the scope of Section 123(2) or Section 123(3) of the Act. In the written statement, the respondent has also denied the averment made by the petitioner in the election petition that Annexure-L is a speech rendered by Smt. Grace Anto with the knowledge and consent of the respondent. In short, the respondent did not dispute Annexure-L speech of his wife, the video of which has been produced as Annexure-K, and the dispute is only as to the date of the said speech.

7. On 25.11.2019, after hearing the learned counsel for the parties, the following issues were framed for trial of the election petition:

(1) Whether Smt. Grace Anto, the wife of the respondent has made Annexure-L speech after the respondent has submitted nomination paper to contest the election as alleged in the election petition and if so, has it been made with the express or implied consent of the respondent;

(2) Whether Annexure-L speech, if found to have been made as alleged in the election petition would constitute corrupt practices defined under Section 123(2) or Section 123(3) of the Representation of People Act, 1951;

(3) Reliefs and costs.

8. After the settlement of issues, the case was posted to 05.12.2019 for pre-trial steps. A few interlocutory applications were filed by the parties thereupon and after the disposal of the same, this Court issued summons to the witnesses cited by the parties for their examination from 07.03.2020 onwards. While the examination of the witnesses in the case was progressing, on 22.07.2020, the petitioner filed I.A. No.3 of 2020 seeking orders for amending issue No.1 and for framing an additional issue. In the affidavit filed in support of the above interlocutory application, it is stated by the petitioner, among others, that even

if the speech of Smt. Grace Anto referred to in the election petition is one rendered on 01.02.2019 as stated by the respondent, the same would amount to "corrupt practice" in terms of the Act and that therefore, the issues framed in the election petition are to be resettled. As both parties agreed that orders on I.A.No.3 of 2020 need not necessarily be passed in the course of examination of the witnesses, orders on the said interlocutory application was deferred.

9. The evidence let in by the petitioner consists of the oral testimonies of PWs 1 to 8 and Exts.A1 to A8 as also Exts.X6 to X27 marked through the said witnesses. The evidence let in by the respondent consists of the oral testimonies of RWs 1 to 4 and Exts.X1 to X5 marked through the said witnesses.

10. Among the witnesses examined on the side of the petitioner, PW1 is the petitioner himself, PWs 2 to 4 are persons cited by the petitioner to prove that Smt. Grace Anto has rendered Annexure-L speech at IPC Prayer Centre, Thiruvalla on 07.04.2019, PW5 is Sri. Alen Mathew Thomas, who is stated to have copied the speech of Smt. Grace Anto in a compact disc and handed over to the petitioner, after downloading the same from YouTube and PW8 is the head of Pathanamthitta Unit of Malayala Manorama Daily. Among the documents, Ext.A1 is Annexure-K compact disc, Ext.A2 is a photograph of the residence of RW3 and Ext.A3 is an order passed by the Munsiff Court, Thiruvalla on 22.01.2015 in O.S. No.52 of 2015 and Exts.X6 to X27 are Malayala Manorama Dailies of various dates.

11. Among the witnesses examined on the side of the respondent, RW1 is the Deputy Superintendent of Police, Thiruvalla, RW2 is the Secretary of IPC Prayer Centre, Thiruvalla, RW3 is the pastor of IPC Prayer Centre, Thiruvalla and RW4 is the former Deputy Superintendent of Police, Thiruvalla. Among the documents, Ext.X1 is the application preferred by RW3 for mike sanction in connection with the programme, Charisma Crusade 2019, organised by IPC Prayer Centre, Thiruvalla, Ext.X2 is the register maintained at the office of the Deputy Superintendent of Police, Thiruvalla in which particulars of the applications for mike sanction received at the office are entered, Ext.X3 is the order passed on Ext.X1 application, Ext.X4 is the minutes book of IPC Prayer Centre, Thiruvalla of the year 2018-19 and Ext.X5 is the Malayala Manorama Daily dated 26.01.2019 containing the advertisement given by IPC Prayer Centre, Thiruvalla in connection with their programme, Charisma Crusade 2019.

12. Among the documents referred to in paragraphs 10 and 11, marking of Ext.A1 as also Exts.X6 to X27 were objected to by the counsel for the respondent on the ground that they are not admissible in evidence and consequently, the said documents were marked subject to further orders as to their admissibility. At the time of hearing, the learned counsel for the respondent did not raise any objection as regards the admissibility of the said documents except Ext.A1. As such, the documents other than Ext.A1 are admitted in evidence. As regards the admissibility of Ext.A1, arguments were advanced by the counsel for the parties on either side and I will be dealing with the same a little later.

13. Heard the learned counsel for the petitioner as also the learned Senior Counsel for the respondent.

14. Before proceeding to adjudicate the issues formulated for decision referred to in paragraph 7, it is necessary to consider I.A. No.3 of 2020 filed by the petitioner for amendment of the issues.

15. Coming to I.A. No.3 of 2020, as noted, the case set out by the petitioner is that even if the speech of Smt. Grace Anto referred to in the election petition is one rendered on 01.02.2019 as stated by the respondent, if it is established that the same was one rendered with the consent of the respondent, the same would amount to corrupt practice vitiating the election of the respondent. The application was opposed by the respondent contending that if Annexure-L speech is one rendered on 01.02.2019, even if it is found that the speech was rendered with the consent of the respondent and that the speech would amount to corrupt practice in terms of the provisions of the Act, the same would not be a ground that would vitiate the election of the respondent. Having heard the learned counsel for the parties on either side, I am of the view that the question whether Annexure-L speech stated to have been made by Smt. Grace Anto on 01.02.2019 would constitute a ground to declare the election of the respondent void also arises for consideration in the matter since it was found in terms of the order dated 06.11.2019 that Annexure-L speech would prima facie amount to corrupt practice in terms of Section 123(3) of the Act. Accordingly, the issues settled for trial of the election petition are resettled thus :

(1) Whether Annexure-L is a speech made by Smt. Grace Anto, the wife of the respondent after the respondent submitted nomination paper to contest the election as alleged in the election petition;

(2) If answer to issue (1) is in the negative, whether Annexure-L speech stated to have been made by Smt.Grace Anto on 01.02.2019 would constitute a ground to declare the election of the respondent void in terms of Section 100 of the Act ;

(3) If answer to issue (2) is in the affirmative, whether Annexure-L speech, if found to have been made with the express or implied consent of the respondent, would constitute corrupt practice defined in Section 123(2) or Section 123(3) of the Act;

(4) Reliefs and costs.

16. I shall now deal with the objection raised by the respondent as to the admissibility of Annexure-K compact disc. As noted, the case of the petitioner is that Annexure-K is the compact disc in which the speech alleged to have been rendered by Smt.Grace Anto on 07.04.2019 at IPC Prayer Centre, Thiruvalla has been copied by PW5, after downloading the same from YouTube. The objection raised by the respondent as to the admissibility of the said piece of electronic record which is treated as a document in terms of the provisions of the Indian Evidence Act is that the petitioner has not complied with the requirements of Section 65B of the Indian Evidence Act. The stand taken by the petitioner as regards the objection aforesaid is that compliance of Section 65B of the Indian Evidence Act is not required in order to admit Annexure-K compact disc in evidence insofar as the respondent has admitted in his proof affidavit the speech contained in Annexure-K compact disc. It is also the stand of the petitioner that compliance of Section 65B of the Indian Evidence Act is not required for the said compact disc in the light of the oral evidence tendered by PW5 to the effect that it is he who copied the speech of Smt.Grace Anto in Annexure-K compact disc, after downloading the same from YouTube. The petitioner also contends that compliance of Section 65B of the Indian Evidence Act is not required for Annexure-K compact disc in the light of the decision of the Apex Court in **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Others,** (2020) 7 SCC 1.

17. In order to resolve the issue relating to the admissibility of Annexure-K compact disc, it is necessary to refer first to the interpretation clause in the Indian Evidence Act relating to the words 'Document' and 'Evidence' and also the expression 'electronic records'. The relevant portion of Section 3 of the Indian Evidence Act dealing with the interpretation of the aforesaid words and expressions reads thus:

> "**3. Interpretation-clause**.—In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context: —
>
> x x x x x
>
> "**Document**". —"Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.
>
> x x x x x
>
> "**Evidence**". —"Evidence" means and includes — (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;
>
> such statements are called oral evidence;
>
> (2) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence.
>
> x x x x x
>
> the expressions "Certifying Authority", "electronic signature", Electronic Signature Certificate, "electronic form", "electronic records", "information", "secure electronic record", "secure electronic signature" and "subscriber" shall have the meanings respectively assigned to them in the Information Technology Act, 2000.

The Information Technology Act, 2000 defines "electronic record" thus:

"electronic record means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;"

Sections 65A and 65B are the special provisions in the Indian evidence Act relating to electronic records and proof of its contents. The said provisions read thus:

65A. Special provisions as to evidence relating to electronic record.—The contents of electronic records may be proved in accordance with the provisions of section 65B.

65B. Admissibility of electronic records.—

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether—

a. by a combination of computers operating over that period; or

b. by different computers operating in succession over that period; or

c. by different combinations of computers operating in succession over that period; or

d. in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,—

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation.—For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.

In the light of Section 65B of the Indian Evidence Act extracted above, Annexure-K compact disc being a computer output in terms of the said section, the same is admissible in any proceedings without further proof or production of the original as evidence of the contents of the original or of any facts stated therein, if the conditions mentioned in Section 65B are satisfied in relation to the information contained therein. The conditions to be satisfied are mentioned in Section 65B(2). In order to satisfy the conditions mentioned in Section 65B(2), it is obligatory for the person tendering the document in evidence to produce a certificate in terms of sub-section (4) of Section 65B.

18 In Arjun Panditrao Khotkar, a three Judge Bench of the Apex Court held, overruling the inconsistent views expressed in a few earlier judgments, that the certificate required under sub-section (4) of Section 65B is a condition precedent for the admissibility of evidence by way of electronic record. It was also held in the said case that oral evidence in the place of such certificate cannot possibly suffice, as sub-section (4) of Section 65B is a mandatory requirement of law and that any other view would render sub-section (4) of Section 65B otiose. It was, however, clarified in the said judgment that the certificate under sub-section (4) of Section 65B of the Indian Evidence Act is unnecessary if the original document itself is produced. Paragraphs 61 and 73 of the judgment in **Arjun Panditrao Khotkar** read thus:

61. We may reiterate, therefore, that the certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P.V. And incorrectly "clarified" in Shafhi Mohammed. Oral evidence in the place of such certificate cannot possibly sufice as Section 65-B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in Taylor v. Taylor, which has been followed in a number of the judgments of this court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if led in the manner stated and not otherwise, To hold otherwise would render Section 65-B(4) otiose.

x x x x x x x

73. The reference is thus answered by stating that:

73.1 *Anvar P.V.* [*Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] , as clarified by us hereinabove, is the law declared by this Court on Section 65-B of the Evidence Act. The judgment in *Tomaso Bruno* [*Tomaso Bruno* v. *State of U.P.*, (2015) 7 SCC 178 : (2015) 3 SCC (Cri) 54] , being per incuriam, does not lay down the law correctly. Also, the judgment in *Shafhi Mohammad* [*Shafhi Mohammad* v. *State of H.P.*, (2018) 2 SCC 801 : (2018) 2 SCC 807 : (2018) 2 SCC (Civ) 346 : (2018) 2 SCC (Civ) 351 : (2018) 1 SCC (Cri) 860 :

(2018) 1 SCC (Cri) 865] and the judgment dated 3-4-2018 reported as *Shafhi Mohd.* v. *State of H.P.* [*Shafhi Mohd.* v. *State of H.P.*, (2018) 5 SCC 311 : (2018) 2 SCC (Cri) 704] , do not lay down the law correctly and are therefore overruled.

73.2. The clarification referred to above is that the required certificate under Section 65-B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the court, then the only means of providing information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4). The last sentence in para 24 in *Anvar P.V.* [*Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] which reads as "*... if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act ...*" is thus clarified; it is to be read without the words "*under Section 62 of the Evidence Act,...*". With this clarification, the law stated in para 24 of *Anvar P.V.* [*Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] does not need to be revisited.

73.3. The general directions issued in para 64 (supra) shall hereafter be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till rules and directions under Section 67-C of the Information Technology Act and data retention conditions are formulated for compliance by telecom and internet service providers.

73.4. Appropriate rules and directions should be framed in exercise of the Information Technology Act, by exercising powers such as in Section 67-C, and also framing suitable rules for the retention of data involved in trial of offences, their segregation, rules of chain of custody, stamping and record maintenance, for the entire duration of trials and appeals, and also in regard to preservation of the metadata to avoid corruption. Likewise, appropriate rules for preservation, retrieval and production of electronic record, should be framed as indicated earlier, after considering the report of the Committee constituted by the Chief Justices' Conference in April 2016.

Admittedly, the certificate in terms of sub-section (4) of Section 65B has not been produced by the petitioner. As noted, the main contention of the petitioner is that compliance of Section 65B of the Indian Evidence Act is not required in order to admit Annexure-K compact disc in evidence insofar as the respondent has admitted in his proof affidavit the speech contained in Annexure-K compact disc. In the light of the non obstante clause contained in Section 65B of the Indian Evidence Act and in the light of the affirmation of law made by the Apex Court in **Anvar P.V. v. P.K. Basheer,** (2014) 10 SCC 473 that the special provisions contained in Section 65A and 65B of the Indian Evidence Act are a complete code in themselves when it comes to admissibility of evidence of information contained in electronic record and also that a written certificate under sub- section (4) of Section 65B is sine qua non for the admissibility of such evidence, the contention aforesaid cannot be accepted. It is all the more so since the said proposition has been reiterated as the correct proposition by the Apex Court in **Arjun Panditrao Khotkar,** overruling the contrary views expressed in some of the cases decided after **Anvar P.V.** The stand of the petitioner that compliance of Section 65B of the Indian Evidence Act is not required in respect of Annexure-K compact disc in the light of the oral evidence tendered by PW5 to the effect that it is he who copied the speech of Smt. Grace Anto in Annexure-K compact disc after downloading the speech from YouTube is also unacceptable in the light of the view expressed by the Apex Court in paragraph 61 of the judgment in **Arjun Panditrao Khotkar** that oral evidence in the place of such certificate is not suffice as Section 65-B(4) is a mandatory requirement of the law. Paragraph 47 of the judgment in **Arjun Panditrao Khotkar** reads thus:

> **47.** However, a caveat must be entered here. The facts of the present case show that despite all efforts made by the respondents, both through the High Court and otherwise, to get the requisite certificate under Section 65-B(4) of the Evidence Act from the authorities concerned, yet the authorities concerned wilfully refused, on some pretext or the other, to give such certificate. In a fact-circumstance where the requisite certificate has been applied for from the person or the authority concerned, and the person or authority either refuses to give such certificate, or does not

reply to such demand, the party asking for such certificate can apply to the court for its production under the provisions aforementioned of the Evidence Act, CPC or CrPC. Once such application is made to the court, and the court then orders or directs that the requisite certificate be produced by a person to whom it sends a summons to produce such certificate, the party asking for the certificate has done all that he can possibly do to obtain the requisite certificate. Two Latin maxims become important at this stage. The first is *lex non cogit ad impossibilia* i.e. the law does not demand the impossible, and *impotentia excusat legem* i.e. when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused. This was well put by this Court in *Presidential Poll, In re* [*Presidential Poll, In re*, (1974) 2 SCC 33] as follows : (SCC pp. 49-50, paras 14-15)

"*14*. If the completion of election before the expiration of the term is not possible because of the death of the prospective candidate it is apparent that the election has commenced before the expiration of the term but completion before the expiration of the term is rendered impossible by an act beyond the control of human agency. The necessity for completing the election before the expiration of the term is enjoined by the Constitution in public and State interest to see that the governance of the country is not paralysed by non-compliance with the provision that there shall be a President of India.

15. The impossibility of the completion of the election to fill the vacancy in the office of the President before the expiration of the term of office in the case of death of a candidate as may appear from Section 7 of the 1952 Act does not rob Article 62(1) of its mandatory character. The maxim of law *impotentia excusat legem* is intimately connected with another maxim of law *lex non cogit ad impossibilia. Impotentia excusat legem* is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. 'Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him.' Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance with the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See *Broom's Legal Maxims*, 10th Edn. at pp. 162-63 and *Craies on Statute Law*, 6th Edn. at p. 268.)"

It is important to note that the provision in question in *Presidential Poll, In re* [*Presidential Poll, In re*, (1974) 2 SCC 33] was also mandatory, which could not be satisfied owing to an act of God, in the facts of that case. These maxims have been applied by this Court in different situations in other election cases — See *Chandra Kishore Jha* v. *Mahavir Prasad* [*Chandra Kishore Jha* v. *Mahavir Prasad*, (1999) 8 SCC 266] (at paras 17 and 21); *Special Reference No. 1 of 2002, In re (Gujarat Assembly Election matter)* [*Special Reference No. 1 of 2002, In re (Gujarat Assembly Election matter)*, (2002) 8 SCC 237] (at paras 130 and 151) and *Raj Kumar Yadav* v. *Samir Kumar Mahaseth* [*Raj Kumar Yadav* v. *Samir Kumar Mahaseth*, (2005) 3 SCC 601] (at paras 13 and 14).

It is placing reliance on paragraphs 47 and 73.2 of the decision aforesaid that the petitioner contends that the case on hand would fall within the exceptional situations made mention of in **Arjun Panditrao Khotkar.** The petitioner has no case that the requisite certificate has been applied for by him from the person or the authority concerned and the person or authority either refused to give such certificate or did not reply to such demand. He has also no case that he has done all that he can possibly do to obtain the certificate. In the circumstances, according to me, the case of the petitioner may not fall within the scope of the exceptional situations made mention of in **Arjun Panditrao Khotkar.**

19. I shall now consider the issues formulated for Needless to say, Annexure-K compact disc which was tendered in evidence by the petitioner is inadmissible in law. decision in the proceedings.

20. Issue (1). The issue in essence is whether Annexure-L is a speech made by Smt. Grace Anto, after the respondent has submitted nomination paper to contest the election. As noted, the election was announced by the Election Commission of India on 10.03.2019 and it was notified later on 28.03.2019. The respondent has submitted nomination paper only thereafter. The specific pleading in the

election petition is that Annexure-L speech was one rendered by Smt.Grace Anto on 07.04.2019 at IPC Prayer Centre, Thiruvalla, whereas the stand of the respondent in the written statement is that the speech was one rendered by Smt.Grace Anto on 01.02.2019 at IPC Prayer Centre, Thiruvalla in connection with their programme 'Charisma Crusade 2019'. As noted, the fact that Annexure-L speech was made by Smt.Grace Anto is not in dispute. The contention of the respondent as regards Annexure-L speech is only that the same would not constitute a ground to seek a declaration that the election of the respondent is void as it was made prior to the date of his nomination and even if the same would constitute a ground to seek the declaration aforesaid, the said relief cannot be granted since it was not one made with his knowledge or consent and at any rate, the same would not constitute "corrupt practice" falling within the scope of Section 123(2) or Section 123(3) of the Act. The question being a pure question of fact to be resolved on the basis of the evidence let in by the parties, it is worth referring to the principles to be followed while undertaking an adjudication of such an issue in an election petition.

21. The word 'proved' is explained in the interpretation clause of the Indian Evidence Act thus:

> "Proved". — A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

Though the Indian Evidence Act does not draw a distinction between civil and criminal cases as far as the proof of facts are concerned, it appears that since the interpretation clause of the Indian Evidence Act starts with the expression "in this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context", courts in course of time prescribed different standard of proof for civil and criminal cases. The principles governing the standard of proof required to establish a corrupt practice in an election petition have been dealt with by the Apex Court in **Razik Ram v. Jaswant Singh Chouhan**, (1975) 4 SCC 769. It was held in the said case that a charge of corrupt practice being substantially akin to a criminal charge involving serious penal consequences, the same has to be established as in a criminal case, and not on the principle of preponderance of probability as applied in civil cases. Paragraph 15 of the judgment reads thus:

> **15.** Before considering as to whether the charges of corrupt practice were established, it is important to remember the standard of proof required in such cases. It is well settled that a charge of corrupt practice is substantially akin to a criminal charge. The commission of a corrupt practice entails serious penal consequences. It not only vitiates the election of the candidate concerned but also disqualifies him from taking part in elections for a considerably long time. Thus, the trial of an election petition being in the nature of an accusation, bearing the indelible stamp of quasi-criminal action, the standard of proof is the same as in a criminal trial. Just as in a criminal case, so in an election petition, the respondent against whom the charge of corrupt practice is levelled, is presumed to be innocent unless proved guilty. A grave and heavy onus therefore, rests on the accuser to establish each and every ingredient of the charge by clear, unequivocal and unimpeachable evidence beyond reasonable doubt. It is true that there is no difference between the general rules of evidence in civil and criminal cases, and the definition of "proved" in Section 3 of the Evidence Act does not draw a distinction between civil and criminal cases. Nor does this definition insist on perfect proof because absolute certainty amounting to demonstration is rarely to be had in the affairs of life. Nevertheless, the standard of measuring proof prescribed by the definition, is that of a person of prudence and practical good sense. "Proof" means the *effect* of the evidence adduced in the case. Judged by the standard of prudent man, in the light of the nature of onus cast by law, the probative *effect* of evidence in civil and criminal proceedings is markedly different. The same evidence which may be sufficient to regard a fact as proved in a civil suit, may be considered insufficient for a conviction in a criminal action. While in the former, a mere preponderance of probability may constitute an adequate basis of decision, in the latter a far higher degree of assurance and judicial certitude is requisite for a conviction. The same is largely true about proof of a charge of corrupt practice, which cannot be established by mere balance of probabilities, and, if, after giving due consideration and effect to the totality of the evidence and circumstances of the case, the mind of the Court is left rocking with reasonable doubt — not being the doubt of a timid, fickle or vacillating mind — as to the veracity of the charge, it must hold the same as not proved.

The proposition aforesaid has been reiterated and followed consistently by the Apex Court and the High Courts in India. In **D. Venkata Reddy v. R. Sultan & Others,** (1976) 2 SCC 455, the Apex Court has cautioned that where the election petitioner seeks to prove charge by purely partisan evidence consisting of his workers, supporters and friends, the courts will have to approach the evidence with great care and caution, scrutiny and circumspection and would, as a matter of prudence, though not as a rule, require corroboration of such evidence from independent quarters, unless the court is fully satisfied that the evidence is so creditworthy and true, spotless, blemishless, cogent and consistent that no corroboration to lend further assurance is necessary. Paragraph 4 of the judgment in the said case reads thus:

> **4.** Another principle that is equally well settled is that the election petitioner in order to succeed must plead all material particulars and prove them by clear and cogent evidence. The allegations of corrupt practices being in the nature of a quasi- criminal charge the same must be proved beyond any shadow of doubt. Where the election petitioner seeks to prove charge by purely partisan evidence consisting of his workers, agents, supporters and friends, the Court would have to approach the evidence with great care and caution, scrutiny and circumspection, and would, as a matter of prudence though not as a rule of law, require corroboration of such evidence from independent quarters, unless the Court is fully satisfied that the evidence is so creditworthy and true, spotless and blemishless, cogent and consistent, that no corroboration to lend further assurance is necessary. It has to be borne in mind that the attempt of the agents or supporters of the defeated candidate is always to get the election set aside by means fair or foul and the evidence of such witnesses, therefore, must be regarded as highly interested and tainted evidence which should be acted upon only if the Court is satisfied that the evidence is true and does not suffer from any infirmity. Where, however, the evidence led by the election petitioner even though consistent is fraught with inherent improbabilities and replete with unnatural tendencies, the Court may refuse to accept such evidence, because consistency alone is not the conclusive test of truth. Judicial experience shows that sometimes even a tutored or parrot-like evidence can be consistent and free from discrepancies and yet not worthy of credence. It is, however, difficult to lay down a rule of universal application because each case will have to be decided on its own facts, but in appreciating the evidence the broad features mentioned above must be borne in mind and have been emphasised by this Court in a large catena of decisions — a few of them may be referred to here.
>
> (underline supplied)

In **Gajanan Krishnaji Bapat v. Dattaji Raghobaji Meghe,** (1995) 5 SCC 347, after reiterating the proposition that the onus lies heavily on the election petitioner to establish the charge of corrupt practice, it was clarified by the Apex Court that in case of doubt, benefit should go to the returned candidate. Paragraph 13 the said judgment reads thus:

> **13.** Though the election of a successful candidate is not to be interfered with lightly and the verdict of the electorate upset, this Court has emphasised in more than one case that one of the essentials of the election law is to safeguard the purity of the election process and to see that people do not get elected by flagrant breaches of the law or by committing corrupt practices. It must be remembered that an election petition is not a matter in which the only persons interested are the candidates who fought the election against each other. The public is also substantially interested in it and it is so because election is an essential part of a democratic process. It is equally well settled by this Court and necessary to bear in mind that a charge of corrupt practice is in the nature of a quasi-criminal charge, as its consequence is not only to render the election of the returned candidate void but in some cases even to impose upon him a disqualification for contesting even the next election. The evidence led in support of the corrupt practice must therefore, not only be cogent and definite but if the election petitioner has to succeed, he must establish definitely and to the satisfaction of the court the charge of corrupt practice which he levels against the returned candidate. The onus lies heavily on the election petitioner to establish the charge of corrupt practice and in case of doubt the benefit goes to the returned candidate. In the case of an election petition, based on allegations of commission of corrupt practice, the standard of proof is generally speaking that of criminal trial, which requires strict proof of the charge beyond a reasonable doubt and the burden of proof is on the petitioner and that burden does not shift. (*See* with advantage : *Nihal Singh* v. *Rao Birendra Singh* [(1970) 3 SCC 239] ; *Om Prabha Jain* v. *Charan Dass* [(1975) 4 SCC 849 : 1975 Supp SCR 107] ; *Daulat Ram*

Chauhan v. *Anand Sharma* [(1984) 2 SCC 64 : (1984) 2 SCR 619] and *Quamarul Islam* v. *S.K. Kanta* [1994 Supp (3) SCC 5] .)

(underline supplied)

I should also refer in this context, the words of caution in the decision of the Apex Court in **Ram Sharan Yadav v. Thakur Muneshwar Nath Singh**, (1984) 4 SCC 649 that while insisting on the standard of strict proof the court should not extend or stretch this doctrine to such an extreme extent as to make it well-nigh impossible to prove an allegation of corrupt practice since such an approach would defeat and frustrate the very laudable and sacrosanct object of the Act in maintaining the purity of election process. The relevant passage in the said case reads thus:

> We would, however, like to add a word of caution regarding the nature of approach to be made in cases where allegations of fraud or undue influence are made. While insisting on standard of strict proof, the Court should not extend or stretch this doctrine to such an extreme extent as to make it well-nigh impossible to prove an allegation of corrupt practice. Such an approach would defeat and frustrate the very laudable and sacrosanct object of the Act in maintaining purity of the electoral process.

Similarly, the distinction drawn by the Apex Court in **Borgaram Deuri v. Premodhar Bora**, (2004) 2 SCC 227, between a criminal trial and the trial of election petition also needs to be remembered while undertaking an adjudication of a factual issue of the instant nature in an election petition. Paragraph 10 of the said judgment reads thus:

> 10. The allegations of corrupt practices are viewed seriously. They are considered to be quasi-criminal in nature. The standard of proof required for proving corrupt practice for all intent and purport is equated with the standard expected in a criminal trial. However, the difference between an election petition and a criminal trial is, whereas an accused has the liberty to keep silent, during the trial of an election petition the returned candidate has to place before the court his version and to satisfy the court that he had not committed the corrupt practice as alleged in the petition. The burden of the election petitioner, however, can be said to have been discharged only if and when he leads cogent and reliable evidence to prove the charges levelled against the returned candidate. For the said purpose, the charges must be proved beyond reasonable doubt and not merely by preponderance of probabilities as in a civil action. (emphasis supplied)

With the aforesaid principles in mind, I shall now proceed to consider the question.

22. In order to prove that Annexure-L is a speech rendered by Smt.Grace Anto on 07.04.2019 at IPC Prayer Centre, Thiruvalla, the evidence let in by the petitioner is the oral evidence of PWs 2 to 4. Among them, PW2 is a person claimed to be residing near IPC Prayer Centre, Thiruvalla. He is a coolie. He deposed that on 07.04.2019, on hearing the announcement of RW3, the Pastor attached to the Prayer Centre about the speech of Smt.Grace Anto, he went to the Church building inside the Prayer Centre and heard the speech of Smt.Grace Anto. Annexure-K compact disc was displayed to PW2 and he affirmed that it is that speech he heard on 07.04.2019. In cross-examination, he pleaded ignorance as to whether there was any stage arrangement for the speech and whether there were any other speakers on that day. While the version of PW2 in chief examination was that he went to the Church building inside the Prayer Centre and heard the speech of Smt. Grace Anto, in cross examination, he stated that he heard the speech by standing outside the Prayer Centre. PW2 is a Christian belonging to CMS denomination. In cross examination, he pleaded ignorance of the full form of CMS. He also pleaded ignorance of the date, month and year in which he was admitted to school. He pleaded ignorance of his date of birth and year of birth. He also pleaded ignorance as to when India got independence. He pleaded ignorance of the dates of birth of his children. He pleaded ignorance as to when the IPC Prayer Centre was established near his residence. In cross-examination, PW2 admitted that he is a member of the political party CPM and he had worked for Smt.Veena George in the election. The evidence tendered by PW2, according to me, is not worthy of any credence for several reasons. First of all, PW2 is a member of the political party of the defeated candidate and a person who had worked for the defeated candidate in the election. It is highly unsafe to place reliance on the evidence of such persons in a proceedings of this nature. Further, it is highly doubtful as to whether PW2 had gone to the Church building inside the IPC Prayer Centre as claimed by him, for if he had gone inside the Church building, he would not have pleaded ignorance to the questions relating to the stage arrangements, other speakers etc. It is seen that it is in the light of such inconvenient questions, he changed the version given in the chief examination and deposed in cross

examination that he heard the speech from outside the Prayer Centre. Similarly, as noted, PW2 who is not aware of any of the important dates in his life has deposed precisely as to the date on which Smt.Grace Anto is alleged to have delivered the speech at the Prayer Centre. The evidence tendered by PW2 does not inspire confidence. That apart, Annexure-L speech was not shown to the witness and there was no occasion for the witness to affirm as to whether the said speech is one rendered by Smt.Grace Anto on 07.04.2019. Insofar as it was found that Annexure-K compact disc which was displayed to the witness is not admissible in evidence, the evidence of PW2 is only to the effect that he heard a speech of Smt. Grace Anto at IPC Prayer Centre on 07.04.2019. The question is as to whether Smt. Grace Anto had rendered Annexure-L speech on 07.04.2019. In other words, the evidence given by PW2 is of no use to the petitioner.

23. Coming to the evidence of PW3, it was stated by him that he is an evangelist and when he visited the IPC Prayer Centre, Thiruvalla on 07.04.2019, he heard the speech of Smt.Grace Anto. Annexure-L speech was shown to PW3 and he affirmed that it was the said speech that he heard on 07.04.2019. In the chief examination itself, PW3 has admitted that he is not a person who is regularly attending the prayers at IPC Prayer Centre, Thiruvalla and that 4 years ago, he had attended IPC Prayer Centre, Thiruvalla once. In cross examination, PW3 has stated that he is a person residing almost 8 kilometers away from IPC Prayer Centre, Thiruvalla. Annexure-K compact disc was displayed to PW3 in his chief examination and he had in fact affirmed that it was the said speech that he heard on 07.04.2019. However, in cross examination, when it was put to PW3 that Annexure-K was the visuals of the programme held on 01.02.2019 in connection with the 'Charisma Crusade 2019', he did not deny the said suggestion. Instead, he pleaded ignorance of the same. According to me, no credence can be attributed to this witness also. At the outset, it must be mentioned that PW3 is not a person who is regularly attending prayers at IPC Prayer Centre, Thiruvalla. He is a person residing about 8 kilometers away from IPC Prayer Centre, Thiruvalla. He admitted that he had visited IPC Prayer Centre, Thiruvalla earlier only twice, once about 4 years ago and once for attending 'Charisma Crusade' organized by the Prayer Centre during 2008. When such a person attends the usual Sunday prayers of IPC Prayer Centre, there would be some reason for the same and the said reason is not forthcoming. Going by the common course of natural events, human conduct and public and private business, according to me, the presence of PW3 at IPC Prayer Centre, Thiruvalla on 07.04.2019 is highly doubtful.

24. Coming to the evidence of PW4, it was stated that he visited IPC Prayer Centre, Thiruvalla on 07.04.2019 and heard the speech of Smt.Grace Anto. Annexure-L speech was shown to him and he affirmed that it was the said speech that he heard on 07.04.2019. In cross-examination, PW4 has stated that he is an agriculturist and he had studied only upto 9th standard. It was stated by PW4 that he is also an evangelist. He has admitted in cross- examination that he belongs to another Pentecostal church called New Indian Church. He also admitted in cross examination that the said Church has Prayer Centres at the place of his residence. As in the case of PW3, according to me, no credence can be attributed to the evidence of PW4 also. As noted, PW4 is an evangelist belonging to another Pentecostal faction. When admittedly there are churches of that faction in and around the place of his residence, there was absolutely no reason for him to attend the Sunday prayer at the Prayer Centre of another Pentecostal faction, without there being a special reason for the same, and the said reason is not forthcoming. As in the case of PW3, going by the common course of natural events, human conduct and public and private business, the presence of PW4 at IPC Prayer Centre, Thiruvalla on 07.04.2019 is also highly doubtful.

25. Now I shall come to the evidence tendered by the respondent. RW1 is the Deputy Superintendent of Police, Thiruvalla who produced Ext.X1 application submitted by IPC Prayer Centre on 21.01.2019 for mike sanction in connection with 'Charisma Crusade 2019'. Exts.X1(a), X1(b) and X1(c) are the documents produced along with Ext.X1 application. Ext.X2 produced by RW1 is the register maintained in his office to enter the particulars of the applications for mike sanction received at the office. Ext.X3 is the order granting mike sanction to IPC Prayer Centre, Thiruvalla in connection with 'Charisma Crusade 2019' for the period from 28.01.2019 to 03.02.2019. Though RW1 was cross-examined on the overwriting in Ext.X1 application, the maintenance of records in his office etc., there was no suggestion to him that mike sanction was not granted to IPC Prayer Centre for the relevant period nor that 'Charisma Crusade 2019' programme was not conducted during the relevant period. RW4 is the Deputy Superintendent of Police who issued Ext.X3 order. He too affirmed the issuance of Ext.X3 order. Even to RW4, there was no suggestion that mike sanction was not granted to IPC Prayer Centre for the relevant period nor that 'Charisma Crusade 2019' programme was not conducted during the said period.

From the oral evidence of RW1 and RW4 and the documents produced by RW1, it is established beyond doubt that IPC Prayer Centre has obtained mike sanction for conducting 'Charisma Crusade 2019' from 28.01.2019 to 03.02.2019.

26. RW2 is the Secretary of IPC Prayer Centre, Thiruvalla since 24.05.2015. He deposed that there are about thousand members in IPC Prayer Centre, Thiruvalla and that RW3 is the Pastor of the Prayer Centre. Ext.X4 is the minute book of the Prayer Centre for the year 2018-19 produced by RW2. He deposed that IPC Prayer Centre used to organize a convention in the name 'Charisma Crusade' every year from last Sunday in the month of January to the first Sunday in the month of February. Ext.X4(a) is the decision taken by the IPC Prayer Centre to conduct the Charisma Crusade programme in the year 2019 from 27.01.2019 to 03.02.2019. RW2 deposed that Charisma Crusade has been conducted in the year 2019 in terms of Ext.X4(a) decision. He clarified that though Ext.X4(a) decision was to conduct 'Charisma Crusade 2019' at the Municipal ground, since that ground was not available, it was conducted in the premises of the IPC Prayer Centre itself. He deposed that advertisements were given in connection with the programme 'Charisma Crusade 2019'. He deposed that mike sanction was obtained from the competent authority in connection with 'Charisma Crusade 2019'. He deposed that application for mike sanction was submitted by RW3. RW2 has identified Ext.X5(a) advertisement given in connection with 'Charisma Crusade 2019' in Malayala Manorama daily. He deposed that Smt.Grace Anto attended the programme on 01.02.2019. RW3 is a retired Government servant. The fact that RW2 is functioning as the Secretary of IPC Prayer Centre since 24.05.2015 is not disputed by the petitioner. Though there was a suggestion to RW2 in cross- examination that RW3 was restrained by a court order to conduct any programme in the premises of IPC Prayer Centre, Thiruvalla, there was no suggestion to RW2 in cross-examination that 'Charisma Crusade 2019' programme was not conducted as decided in the year 2019. Likewise, there was no cross-examination to RW2 as regards his evidence that Smt.Grace Anto attended Charisma Crusade 2019 on 01.02.2019. To a specific question put by the counsel for the respondent as to whether Smt.Grace Anto had visited IPC Prayer Centre on any day other than 01.02.2019, his answer was that he does not know. Similarly, to a specific question put to the said witness as to whether Smt.Grace Anto has made a speech on 07.04.2019 in the IPC Prayer Centre, his answer was that he does not know. The answers given by RW2 to the aforesaid questions would reveal that he is an impartial witness. Even otherwise, I found RW2 to be a respectable independent witness. RW3 is the Pastor of the IPC Prayer Centre, Thiruvalla. He deposed that he was serving the Prayer Centre since 1992. He identified Ext.X1 application for mike sanction submitted by him in connection with 'Charisma Crusade 2019'. RW3 deposed that he knows the wife of the respondent and he had invited her to Charisma Crusade 2019 and she had attended the prayers held on 01.02.2019 and delivered a speech. Though RW3 was cross-examined on the basis of a court order restraining him from conducting any programme at the IPC Prayer Centre, Thiruvalla, there was no suggestion to him also that 'Charisma Crusade 2019' was not conducted at IPC Prayer Centre, Thiruvalla as decided by the Prayer Centre. The aforesaid evidence tendered by RW3 corroborates the evidence tendered by RW2.

27. In answer to a specific question put by the counsel for the respondent, RW3 has stated that Smt.Grace Anto had not attended the IPC Prayer Centre, Thiruvalla on 7.4.2019. As noted, the very same question was put to RW2 also and his answer to that question was that he does not know. In other words, the evidence tendered by RW2 and RW3 in this regard is not consistent. As such, I am not attributing any credence to that part of the evidence tendered by RW3. It can, therefore, be seen that the evidence tendered by the respondent would only establish that IPC Prayer Centre, Thiruvalla had organized the programme 'Charisma Crusade 2019' and Smt.Grace Anto had attended the said programme on 1.2.2019. In this context, it must be noted that neither RW2 nor RW3 has spoken anything about the particulars of the speech made by Smt. Grace Anto on 1.2.2019.

28. The learned counsel for the petitioner vehemently argued, placing reliance on Section 106 of the Indian Evidence Act that the date of Anneuxre-L speech being a fact which is especially within the knowledge of Smt.Grace Anto, it was obligatory for her to give evidence in the case and in the absence of any evidence by Smt.Grace Anto, this Court should hold that Annexure-L speech is one rendered by Smt.Grace Anto on 7.4.2019 as pleaded by the petitioner. This argument is unacceptable as Smt.Grace Anto being not a party to the proceedings, she has no burden to prove any fact in this proceedings. Identical contention has been rejected By the Apex Court in **Razik Ram.** Paragraph 117 of the judgment dealing with the said aspect reads thus :

> **117.** In the first place, it may be remembered that the principle underlying Section 106, Evidence Act — which is an exception to the general rule governing burden of proof — applies only to such matters of defence which are supposed to be especially within the knowledge of the defendant/respondent. It cannot apply when the fact is such as to be capable of being known also by persons other than the respondent. In the present case, the carriage of voters free of charge, was obviously known to several persons other than the appellant. No less than thirteen voters were named by PWs 9, 10 and 12 who were alleged to have travelled in this truck. Besides others, this fact would be fully known to them. The petitioner could, if he so desired, examine at least some of them to prove this fact. But none was produced by him. One of them, Prem Raj who was examined by the appellant denied having travelled in this truck. The High Court has rejected his evidence merely on the ground that he had supported Kanwal Singh's version — which in the opinion of the High Court was false — in regard to the carriage of sand in the truck, although there was a discrepancy in their statements about the time of such carriage. In our opinion this was hardly a good ground to brush aside Prem Raj's otherwise reliable testimony. We have already pointed out that one-way carriage of sand in this truck from Fazalpur to Turakpur was not necessarily false.

It was also argued by the learned counsel for the petitioner that it is a case where the respondent should have given evidence, and despite the fact that the respondent has filed a proof affidavit in the matter, he did not come forward to give evidence. According to the learned counsel, in the circumstances, adverse inference needs to be drawn on all facts in issue against the respondent. There is no substance in this argument also, as it is for the respondent to decide as to whether he should give evidence in this matter and if he chooses not to give evidence in the matter, the petitioner cannot compel him to give evidence, especially when the burden to establish the various facts in issue in the case is on the petitioner.

29. It has come out from the materials on record that IPC Prayer Centre, Thiruvalla is a Prayer Centre, which has more than thousand members. The fact that Sunday prayers as also conventions are being conducted in the Prayer Centre for the last so many years is not in dispute. The petitioner has not examined any member of the Prayer Centre to establish his case that Annexure L speech was one rendered by Smt.Grace Anto on 7.4.2019. He has also not examined Smt.Grace Anto as a witness in the proceedings to give evidence on his side. The petitioner can certainly pretend that being the wife of the respondent, Smt.Grace Anto would not give evidence in his favour. But at the same time, had the case of the petitioner that Annexure L speech was one rendered by Smt.Grace Anto on 7.4.2019 been genuine, he must have certainly made an attempt to examine her and discredit her evidence, if she had not supported his case. Instead, he had chosen to examine passersby and street evangelists who have nothing to do with the Prayer Centre and who belong to different faith, for the purpose of proving what has happened in the course of Sunday prayer in a Christian Prayer knit affair of the Centre which is normally a close Parishioners / members of the Prayer Centre. Similarly, it is the specific case pleaded by the petitioner in the election petition that somebody video-graphed the speech alleged to have been rendered by Smt.Grace Anto on 7.4.2019 and uploaded in YouTube. That person would have been the most competent witness to depose before this Court as to when Annexure-L speech was made by Smt.Grace Anto. Though the particulars of that person was brought out in the cross examination of PW5, the petitioner has not chosen to examine that person in the proceedings, nor has he put forward any explanation for not examining that person. It is the obligation of every party obliged to prove a fact in a judicial proceedings to adduce the best evidence possible to prove the fact. I have no doubt that the petitioner has not attempted to adduce the best evidence in this case. The conduct of the petitioner in withholding the best evidence also casts serious doubt as to the genuineness of the case of the petitioner that Annexure-L speech was one rendered by Smt.Grace Anto on 7.4.2019. In short, I hold that the petitioner has not proved without any shadow of doubt that Annexure-L speech was one rendered by Smt.Grace Anto on 7.4.2019. The issue is answered against the petitioner.

30. Issue (2): The case of the petitioner is that Section 100 of the Act dealing with the grounds for declaring the election of a returned candidate void, refers only to the corrupt practice committed by the returned candidate or his election agent or by any other person with the consent of the returned candidate or his election agent and therefore, the date on which the corrupt practice has been committed is irrelevant. According to the petitioner, since the respondent was holding out to be a candidate for the ensuing election, on 1.02.2019, when his wife is stated to have made Annexure L speech, the said speech, if amounts to corrupt practice and if made with the knowledge and consent of the respondent, the same

would certainly be a ground to declare the election of the respondent void. The case of the respondent, on the other hand, is that he was not a candidate on 01.02.2019 and therefore, even if it is found that Annexure-L speech would constitute corrupt practice in terms of the provisions of the Act and that the same was made with the knowledge and consent of the respondent, the same would not be a ground to declare the election of the respondent void in terms of Section 100 of the Act. The question therefore, is whether Annexure-L speech stated to have been made by Smt.Grace Anto, the wife of the respondent on 01.02.2019 would constitute a ground to declare the election of the respondent void in terms of Section 100 of the Act.

31. In the course of the arguments, the learned counsel for the petitioner conceded that the definition of "candidate" contained in Section 79(b) of the Act would take within its scope only a person who has been or claims to have been duly nominated as a candidate at an election. But, according to the learned counsel, that definition may not be of any significance in the context of the court examining an issue relating to corrupt practice, for Section 79 of the Act starts with the expression "unless the context otherwise requires". According to the learned counsel, in the context of examining an issue relating to corrupt practice committed by the returned candidate, if the definition of "candidate" contained in Section 79(b) is applied as such, the object of the statute, viz, to have free and fair election cannot be achieved. The learned counsel elaborated the aforesaid argument pointing out that if the word "candidate" is understood as defined in Section 79(b) of the Act in the context of examining an issue relating to corrupt practice, one would be in a position to resort to all sorts of prohibited acts before submission of his nomination and then reap its illegitimate benefits after submitting nomination. Similarly, it was pointed out by the counsel that in this era of information technology, if the aforesaid course is applied, people would be in a position to make speeches in the nature of one made in the case on hand before submission of the nomination and circulate the same in social media, after the submission of the nomination to reap the benefit of the same. It was also argued strenuously by the learned counsel that the expression "unless the context otherwise requires" contained in Section 79 of the Act confers power on the Court to mould the definition of "candidate" appropriately, so as to secure free and fair election which is the main object of the Act. In support of the said proposition, the learned counsel placed reliance on the following passage from the decision of the Apex Court in **Smt. Indira Nehru Gandhi v. Shri Raj Narain**, (AIR 1975 SC 2299) :

> "There can be no doubt that Section 100(1)(*b*), when it speaks of commission of corrupt practice by a returned candidate, it can only mean commission of corrupt practice by a candidate before he became a returned candidate. Any other reading of the sub-section would be absurd. But there is no such compulsion to read the word "candidate" in Section 123(7) in the same manner. It is the context that gives colour to a word. A word is not crystal clear. Section 79 of the Act indicates that the definitions therein have to be read subject to the context." (Emphasis supplied).

It was pointed out by the learned counsel for the petitioner that prior to the Election Laws Amendment Act, 1975, the word "candidate" was defined to include not only a person who has been or claims to have been duly nominated as a candidate at any election, but also persons holding out to be candidates, and the said definition was amended to its present form as it was found that such a wide definition would preclude persons holding office from discharging their functions, if they intend to contest the election. According to the learned counsel, merely for the reason that the definition of "candidate" has undergone a change from its form prior to the Election Laws Amendment Act, 1975 to its present form, it cannot be contended that the amended definition has to be applied invariably in all cases involving adjudication of issues relating to corrupt practice without referring to the facts. The argument of the learned counsel, therefore, is that if the election of a returned candidate is challenged on the ground of corrupt practice, the date on which the corrupt practice is committed should be held to be irrelevant except in cases where the candidate was a public servant and where he was obliged to do many things in discharge of his official functions which would otherwise constitute corrupt practice. To bring home the point, the learned counsel placed reliance on a passage from the decision of the Apex Court in **Govind Singh v. Harchand Kaur,** (2011) 2 SCC 621 which is reproduced hereunder:

> As already recorded hereinbefore, this Court in a series of decisions out of which two have been referred to hereinbefore, have taken the view that any act performed by a candidate prior to his becoming a candidate would not amount to indulgence in corrupt practice. However, we do not wish to be understood so as to endorse that even if any illegal act has been done by a candidate prior to his filing of nomination which is not within the legal discharge of duty, would not

amount to corrupt practice so as to protect himself from the charge of corrupt practice. But where the appellant in discharge of his official duty distributed, sanctioned, approved or permitted the grant of old age/widow/handicapped pension prior to the filing of his nomination which was 23-1-2002 in the case at hand, it cannot be construed as indulgence in corrupt practice and hence, we find sufficient force in the contention of the counsel for the appellant on this count to the effect that he cannot be held to have committed corrupt practice if he had distributed pension amount even in his constituency up to 12-1-2002 which was clearly within his legal and official domain as he was not a candidate in the election. (emphasis supplied)

It was also argued by the learned counsel for the petitioner that the contention advanced by the respondent is purely technical and placing reliance on the decision of the Apex Court in **S.R.Bommai and others v. Union of India and others**, (1994) 3 SCC 1, it was pointed out that nobody shall be permitted to circumvent the provisions contained in Section 123 (3) of the Act by resorting to technical arguments, for acceptance of such a course would spoil the secular fabric of our country. Similarly, placing reliance on the decision of the Apex Court in **Abhiram Singh v. Commachen,** 2017 (1) KLT 229 (SC), it was also argued by the learned counsel that the scheme of the Act is that religion, race, caste, community or language shall not be allowed to play any role in an electoral process and the technical contention advanced by the respondent, if accepted, would go against the scheme of the Act.

32. In order to consider the question involved, it is necessary to refer to the definition of "candidate" as also "returned candidate" contained in the Act. Section 79 of the Act dealing with the definition of "candidate" as also "returned candidate" reads thus:

"79. Definitions.—In this Part and in Part VII unless the context otherwise requires,—

x x x x x

(b) "candidate" means a person who has been or claims to have been duly nominated as a candidate at any election;

x x x x x

(f) "returned candidate" means a candidate whose name has been published under section 67 as duly elected."

As noted, Section 79(b) of the Act defines "candidate" as a person who has been or claims to have been duly nominated as a candidate at any election and Section 79(f) of the Act defines "returned candidate" as a person whose name has been published under Section 67 of the Act as duly elected. The definition of "candidate" contained in Section 79(b) is one amended to its present form in terms of Election Laws (Amendment) Act (40 of 1975). Prior to the said amendment, the word "candidate" was defined in the Act thus:

"candidate" means a person who has been or claims to have been duly nominated as a candidate at any election and any such person shall be deemed to have been a candidate as from the time when, with the election in prospect, he began to hold himself out as a prospective candidate."

When Section 100(1)(b) of the Act speaks of commission of corrupt practice by a returned candidate, indubitably it means only commission of corrupt practice by a candidate before he became a returned candidate. True, Section 79 of the Act containing the definitions of the words "candidate" and "returned candidate" starts with the expression "in this part and in part VII unless the context otherwise requires", but it is seen that similar argument was rejected by the Constitution bench of the Apex Court in **Smt.Indira Nehru Gandhi** in the context of an allegation of corrupt practice falling within the scope of Section 123(7) of the Act. The contention was that the word "candidate" has been used merely to identify the person who is duly nominated as a candidate at an election and that the word "candidate" mentioned in Section 123(7) of the Act would also include a person who, after the commission of the corrupt practice specified in that clause is subsequently nominated as a candidate. The relevant passage from paragraph 218 of the said judgment of the Apex Court dealing with the contention aforesaid is reproduced hereunder:

"Perusal of the above clause shows that what constitutes corrupt practice under the above clause is the obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or by any person with the consent of a candidate or his election agent any assistance (other than the giving of vote) for the furtherance of the prospects of the candidate's election from any

person in the service of the Government and belonging to any of the classes specified therein. It is, in my opinion, essential that at the time the impugned act, namely, the obtaining or procuring or abetting or attempting to obtain or procure the assistance of a government servant is done, the person doing the act must be a candidate or his agent or any other person with the consent of a candidate or his election agent. Candidate in this clause would mean a person who has been or who claims to have been duly nominated as a candidate at the election. I am unable to accede to the submission of Mr Shanti Bhushan that the word "candidate" has been used merely to identify the person who is duly nominated as a candidate at an election and that the word "candidate", as mentioned in clause (7), would also include a person who, after the commission of the corrupt practice specified in that clause, is subsequently nominated as a candidate. The amended definition reproduced above shows that unless context otherwise requires, candidate means a person who has been or claims to have been duly nominated as a candidate at an election. To accede to the submission of Mr Shanti Bhushan would be tantamount to reading in the definition of the word "candidate" in addition to the words "who has been or claims to have been duly nominated" also the words "who is subsequently nominated as a candidate". There is nothing to indicate that the word "candidate" in clause (7) of Section 123 has been used merely to identify the person who has been or world be subsequently nominated as a candidate. A definition clause in a statute is a legislative device with a view to avoid making different provisions of the statute to be cumbersome. Where a word is defined in the statute and that word is used in a provision to which that definition is applicable, the effect is that wherever the word defined is used in that provision, the definition of the word gets substituted. Reading the word "candidate" in Section 123(7) of the RP Act in the sense in which it has been defined as a result of the amendment made by Act 40 of 1975, I find that the only reasonable inference is that the person referred to as a candidate in that clause should be a person who has been or claims to have been duly nominated as a candidate at an election and not one who is yet to be nominated."

The contention advanced by the learned counsel that if the meaning of the word "candidate" contained in Section 79 of the Act is attributed to the said word as used in provisions relating to corrupt practice, only prejudicial acts undertaken by the candidate and others from the date of nomination of the candidate can be considered by the court and if such a course of action is adopted, the very object of the Act, viz, to have free and fair election cannot be achieved, has also been repelled by the Apex Court in **Smt.Indira Nehru Gandhi,** holding among others, that it is necessary while dealing with corrupt practice relating to elections to specify the period within which the impugned act, alleged to constitute corrupt practice should have been done, or otherwise an element of indefiniteness and uncertainty would creep in finding the date from which a person can be said to be candidate; that certainty is an essential desideratum in law and that the choice of date made by the legislature for this purpose cannot be interfered with or substituted by the Court. Paragraph 235 of the judgment of the Apex Court dealing with the said finding reads thus:

235. The change in the definition of the word "candidate" to which our attention has been invited by Mr. Shanti Bhushan does not impinge upon the process of free and fair elections. The fact that as a result of the above change, we have to take into account only the prejudicial activity of the candidate or his election agent from the date of the nomination of the candidate and not from the date he holds himself out as a candidate does not affect the process of free and fair elections. It is necessary while dealing with corrupt practice relating to elections to specify the period within which the impugned act, alleged to constitute corrupt practice should have been done. As a result of the amendment, the legislature has fixed the said period to be as from the date of nomination instead of the period as from the date on which the candidate with the election in prospect began to hold himself out as a prospective candidate. It is common experience that the date from which a candidate hold himself out as a prospective candidate is often a matter of controversy between the parties. The result is that an element of indefiniteness and uncertainty creeps in finding the date from which a person can be said to be candidate. As a result of the change in the definition of candidate, the legislature has fixed a definite date, viz., that of nomination, instead of the earlier time which had an element of indefiniteness and uncertainty about it for finding as to when a person became a candidate. Certainty is an essential desideratum in law and any amendment of law to achieve that object is manifestly a permissible piece of legislation. The choice of date was a matter for the legislature to decide and the court cannot substitute its own opinion for that of the legislature in this respect, more so, when whatever be the choice of date,

has aspects of both pros and cons. The date of nomination is normally, as in the present case, about a month before the date of polling and it is plain that most of the acts of corrupt practice are committed during this period. In any case, as mentioned above, the court cannot substitute its own opinion for that of the legislature in the choice of date. The choice of date, as observed in the case of Union of India v. M/s. Parameshwaran Match Works, (AIR 1974 SC 2349) as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. When it is seen that a line or a point there must be and there is no mathematical or logical way of finding it precisely, the decision of the legislature or its delegate must be accepted unless we can say that it is very wide of any reasonable mark.

33. In **Subhash Desai v. Sharad J. Rao,** 1994 Supp (2) SCC 446, relying on **Smt.Indira Nehru Gandhi,** the Apex Court has held that any allegation of corrupt practice against the returned candidate made by the election petitioner in respect of the period prior to the filing of the nomination by the returned candidate cannot be taken into consideration for judging the legality or validity of the election. Paragraph 18 of the said judgment reads thus:

> **18.** On behalf of the appellant, it was then pointed out that in election petition, while alleging corrupt practices, reference has been made in respect of the speeches and publications, of period prior to 31-1-1990, which was the date when nomination papers were filed. The publications and speeches alleged to have been made prior to 31-1-1990 have to be ignored because the framers of the Act, required the High Court to judge the conduct of the candidate, his agent or persons with the consent of the candidate or his election agent, only after a person becomes a candidate for the particular election. A person becomes a candidate for the election in question only after filing the nomination paper. In this connection, reference may be made to Section 79(*b*) of the Act which defines 'candidate' to mean a person, who has been or claims to have been duly nominated as a candidate at any election. Section 34 of the Act says that a candidate shall not be deemed to be duly nominated for election from a constituency unless he deposits or causes to be deposited the amounts prescribed in the said section. When a person becomes a candidate, was examined by this Court in the well- known case of *Indira Nehru Gandhi* v. *Raj Narain* [1975 Supp SCC 1] and it was held: (SCC p. 64, para 146)
>
> > "The 1951 Act uses the expression "candidate" in relation to several offences for the purpose of affixing liability with reference to a person being a candidate. If no time be fixed with regard to a person being a candidate it can be said that from the moment a person is elected he can be said to hold himself out as a candidate for the next election."
> >
> > Recently, this Court in the case of *Mohan Rawale* v. *Damodar Tatyaba* [(1994) 2 SCC 392] has said:
> >
> > "We hold that all the averments in paragraphs 1 to 20 of the memorandum of election petition insofar as they refer to a period prior to 23-4-1991 cannot amount to allegations of corrupt practice."
>
> This cut-off date 23-4-1991 was fixed with reference to the date when nomination papers were filed by the appellant concerned, because since that date the appellant will be deemed to have legally acquired the status of a candidate. According to us, any allegation of corrupt practice against the appellant, made by the respondent in respect of the period prior to the filing of nomination by the appellant on 31-1-1990, cannot be taken into consideration for judging the legality or validity of his election.

The judgment aforesaid is rendered in a case where the allegation was that the returned candidate has committed corrupt practice as defined in Section 123(3) and Section 123(3A) of the Act. Similarly, in **Mohan Rawale v. Damodar Tatyaba,** (1994) 2 SCC 392, the Apex Court has held that substituted definition of "candidate" excludes the acts by a candidate upto the date he is nominated as a candidate. Paragraphs 3 to 8 of the said judgment read thus :

> **3.** We have heard Shri G.L. Sanghi for the appellant and Shri R.F. Nariman for the respondents. We grant special leave. The appeal is heard and is disposed of by this order. A number of grounds appear to have been taken before the High Court in support of the Chamber Summons. But Shri Sanghi confined himself to and urged only three contentions in support of this appeal:

(i) The first is that the allegation of corrupt practice under Sections 123(2), 123(3) and 123(3-A) in paras 1 to 20 of the memorandum of election petition refer to matters long anterior to April 23, 1991 when the nomination papers were lodged by the appellant and on which date alone appellant could be said to have legally acquired the status of a candidate and that, therefore, the allegations in these paragraphs relating, as they do, to a period anterior to April 23, 1991 even if proved, would not amount to corrupt practice by a candidate. Accordingly, these pleadings require to be struck out.

(ii) Secondly, the allegations in other paragraphs of the petition are vague, bereft of material particulars and do not disclose a reasonable cause of action.

(iii) Thirdly, the copies of certain documents which were an integral part of the pleadings were not supplied. Shri Sanghi referred to two instances which, according to him, attract Section 81. One was the non-supply of notes said to have been prepared by Milind Ranade (agent of the first respondent) of the speech of a certain Sadhvi Ritambhra in support of the appellant's candidature declined by her on May 21, 1991. The other was the cassette recording of that speech referred to by the first respondent in the election petition.

4. On the first point, Shri Sanghi contends that the High Court fell into an error in not appreciating the effect of the substitution of the definition of the expression 'candidate' in Section 79(*b*) of the Act brought about by Act 40 of 1970 which, in effect, made a person a "candidate" only from the day he was duly nominated as a candidate at the election. Shri Sanghi says that while the old definition required that "any person shall be declared to have been a candidate as from the time when, with the election in prospect, he began to hold himself out as a prospective candidate" the substituted Section 79(*b*), however, did away with these words. The effect of this, says Shri Sanghi, is profound and far-reaching and renders all the allegations of corrupt practice in paras 1 to 20 in relation to a period prior to the nomination irrelevant and incapable, in law, even to amount to allegations of corrupt practice. It is urged that as the candidature could be said to have legally commenced only on April 23, 1991 even if all the allegations of facts contained in paras 1 to 20 are deemed to have been proved by non-traverse or otherwise held proved, they could not establish corrupt practice. It was accordingly urged that those paragraphs in the election petition require to be struck out.

5. The High Court rejected this contention and held:

"In my judgment, it would not be appropriate to hold that the averments contained in the aforesaid paragraphs are unnecessary or irrelevant. In my view they are very much relevant to the facts in issue. The pleadings in these paragraphs are the foundation for the cause of action and they are material facts which constitute corrupt practice under Sections 123(2), (3), (3-A) of the Act."

The reason for that view, according to the High Court, is:

"It would be seen that the candidature of Respondent 1 was finalised on April 16, 1991 and Respondent 1 and his party workers had started campaigning on that day. In the issue of *Samna* dated April 19, 1991 the candidature of Respondent 1 was officially and formally announced by the Shiv Sena party and Respondent 1 accepted the candidature by remaining present in the public meeting held on April 19, 1991 at Girgaum-Chowpatty. Respondent 1 was introduced to the voters in the said public meeting and Respondent 1 also sought the blessings of Shri Bal Thackeray in the said public meeting. Respondent 1 was thus holding out to be a candidate from April 16, 1991."

6. This, we are afraid, is not the correct perception of the matter. The view fails to take note of and give effect to the substitution of the definition of the expression "candidate" in Section 79(*b*). All sub-sections of Section 123 of the Act refer to the acts of a 'candidate' or his election agent or any other person with the consent of the candidate or his election agent. The substituted definition completely excludes the acts by a candidate up to the date he is nominated as a candidate. Shri Sanghi, therefore, asks us to take this position to its logical conclusions and strike out these allegations in the election petition.

7. Shri R.F. Nariman for the first respondent found it difficult to support the view taken by the High Court as to the time at which appellant's candidature could be said to have commenced. However, Shri Nariman endeavoured to contend that even if the allegations in paragraphs 1 to 20 did not, by themselves, establish corrupt practice in law by virtue of their commission prior to the appellant becoming a candidate, these averments and allegations must be read as parts of similar transactions pleaded in the later and subsequent paragraphs of the memorandum of the election petition. Shri Nariman said that, at all events, the allegations in paragraphs 1 to 20 cannot be said to be irrelevant if they can be sustained for the purposes of probabilising or furnishing "similar-fact" evidence of the allegations of corrupt practice made in the later paragraphs of the election petition.

8. We hold that all the averments in paragraphs 1 to 20 of the memorandum of election petition insofar as they refer to a period prior to April 23, 1991 cannot amount to allegations of corrupt practice. But on the question whether they are relevant and admissible for other purposes for the reasons submitted by Shri Nariman we abstain from expressing any opinion. This aspect did not engage the attention of the High Court and was not considered by it. It is for the High Court to consider them at the appropriate time. We, therefore, declare that the allegations in paras 1 to 20 relating to the period anterior to the commencement of the candidature cannot be relied upon to establish corrupt practice *proprio vigore.*

The aforesaid is also a judgment involving a case of corrupt practice under Sections 123(2), 123(3) and 123(3A) of the Act. It is seen that **Subhash Desai** was followed by the Apex Court in **Chandrakanta Goyal v. Sohan Singh Jodh Singh Kohli,** (1996) 1 SCC 378 , which again was a case involving corrupt practice under Section 123(3) of the Act. Paragraphs 1 to 3 of the said judgment read thus:

1. This is an appeal under Section 116-A of the Representation of the People Act, 1951 (for short "the Act") by the returned candidate against the judgment dated 1st and 2nd July, 1991 of H. Suresh, J. of the Bombay High Court in Election Petition No. 19 of 1990 by which the election of the appellant has been set aside on the ground under Section 100(1)(*b*) for commission of corrupt practices under sub-sections (3) and (3-A) of Section 123 of the Act. The appellant was the candidate of the Bhartiya Janata Party and the respondent was the candidate of the Janata Dal for election to the Maharashtra Legislative Assembly from No. 33, Matunga Constituency held on 27-2- 1990. The appellant became candidate at the election on 8-2- 1990. The date of poll was 27-2-1990 and the election result was declared on 1-3-1990 at which the appellant was declared duly elected having secured 31,530 votes while the respondent (election petitioner) had secured 28,021 votes and the Congress candidate secured 28,426 votes. The election petition was filed on the ground under Section 100(1)(*b*) alleging commission of corrupt practices under Sections 123(3) and 123(3-A) of the Act. These corrupt practices were alleged on the basis of certain speeches made on 29-1-1990 and 24-2-1990 by leaders of the political alliance of BJP and Shiv Sena which supported the candidature of the appellant who was a BJP candidate. In addition, speeches of the appellant made on 8-2-1990 and 15-2- 1990 were also relied on. The gravamen of the charge of corrupt practices was that these speeches amounted to appeal to the voters on the ground of Hindu religion which is the religion of the appellant.

2. The High Court rejected the claim made in the petition that the speeches of the appellant made on 8-2-1990 and 15-2-1990 amounted to the above corrupt practices. Learned counsel for the respondent rightly made no attempt to assail this finding of the High Court to support the judgment. We have been taken through the contents of the speeches made by the appellant on 8-2-1990 and 15-2-1990 in her election campaign. We find nothing therein to doubt the correctness of the High Court's finding that both these speeches are innocuous and there is nothing in them to constitute any of the corrupt practices under sub-sections (3) and/or (3-A) of Section 123 of the Act.

3. So far as the speeches of 29-1-1990 are concerned, there can be no doubt that the same have no relevance in the present context inasmuch as they were acts prior to the date on

> which the appellant became a candidate at the election. This being so, any speech made prior to the date on which she became a candidate at the election cannot form the basis of a corrupt practice by any candidate at that election since any act prior to the date of candidature cannot be attributed to her as a candidate at the election. For this reason, the learned counsel for the respondent rightly made no attempt to dispute this position. (See *Subhash Desai* v. *Sharad J. Rao* [1994 Supp (2) SCC 446] .)

Identical view has been taken by the Apex Court in **Manohar Joshi v. Nitin Bhaurao Patil,** (1996) 1 SCC 169 also, which again was a case involving corrupt practice under Sections 123(3) and 123 (3A)of the Act. Paragraph 36 of the judgment in the said case reads thus:

> **36.** Assuming the contents of the video cassette amount to the kind of speech or act which is a corrupt practice under sub- section (3) or sub-section (3-A) of Section 123, in order to constitute that corrupt practice it must further be shown that the act was done during the election campaign between 8-2-1990, when the returned candidate became a 'candidate' and 27-2- 1990, the date of poll, and that it was the act of the candidate or his agent or any other person with his consent. Unless all these constituent parts of the corrupt practice are pleaded to constitute the cause of action raising a triable issue and are then proved by evidence, the corrupt practice cannot be held to be pleaded and proved. If the act attributed is by the display of a video cassette recorded sometime earlier, the display being between the above dates in the constituency, a mere display of the video cassette does not prove all the constituent parts of the corrupt practice, inasmuch as it must also be pleaded and proved that such display was by the candidate or his agent or any other person with his consent. Where the display of the cassette is attributed to any other person with the consent of the candidate, the liability of the candidate for commission of the corrupt practice results vicariously from the act of the other person done with the consent of the candidate. In such a case, the constituent part of the corrupt practice is the act done by any other person, not by the candidate himself or his agent for whose act the candidate's consent is assumed, with the authorisation for the act being done by any other person with the candidate's consent. This distinction between the act amounting to corrupt practice done by the candidate himself or his election agent and any other person with his consent has to be kept in view. This has relevance also for the purpose of Section 99 of the R.P. Act with reference to which one of the arguments has been addressed.

In the light of the binding judgments of the Apex Court aforesaid, none of the arguments advanced by the learned counsel for the petitioner in support of the contention that the speech stated to have been rendered by the wife of the respondent on 01.02.2019 would constitute a ground to seek a declaration that the election of the returned candidate is void, sustainable in law.

34. True, after taking note of the fact that the Apex Court in a series of decisions has taken the view that any act performed by a candidate prior to his becoming a candidate would not amount to indulgence in corrupt practice, in **Govind Singh**, the Apex Court has made the following remarks :

> "However, we do not wish to be understood so as to endorse that even if any illegal act has been done by a candidate prior to his filing of nomination which is not within the legal discharge of duty, would not amount to corrupt practice so as to protect himself from the charge of corrupt practice".

First of all, **Govind Singh** is a case where the allegation was that the candidate who was holding a public office has sanctioned and disbursed pension to old age people, widows etc. After holding that the said acts have been done in discharge of the official duty of the candidate and cannot be treated therefore as acts of corrupt practice, the Apex Court has made the quoted remarks. First of all, the remarks aforesaid are contrary to the dictum of the Apex Court in the various cases referred to herein before. Further, according to me, the same can be regarded only as casual remarks. In **Arun Kumar Aggarwal v. State of Madhya Pradesh,** (2014) 13 SCC 707, after referring to the American Jurisprudence, P. Ramanatha Aiyar's Law Lexicon, Wharton's Law Lexicon, Black's Law Dictionary, Words and Phrases Permanent Edn., Corpus Juris Secundum, Halsbury's Laws of England and a large number of earlier decisions of the Apex Court, the Apex Court has clarified that such casual remarks cannot be considered or treated as the authoritative or operative part of the judgment. Paragraph 34, which is relevant in the context, reads thus :

"34. In view of the above, it is well settled that obiter dictum is a mere observation or remark made by the court by way of aside while deciding the actual issue before it. The mere casual statement or observation which is not relevant, pertinent or essential to decide the issue in hand does not form the part of the judgment of the Court and have no authoritative value. The expression of the personal view or opinion of the Judge is just a casual remark made whilst deviating from answering the actual issues pending before the Court. These casual remarks are considered or treated as beyond the ambit of the authoritative or operative part of the judgment." In the light of the said judgement of the Apex Court, the argument based on the decision of the Apex Court in **Govind Singh** is only to be rejected and I do so.

35. Before concluding the discussions on this issue, it is necessary to mention that in the light of the decision of the Apex Court in **Smt. Indira Nehru Gandhi** that for dealing with corrupt practices, it was necessary for the legislature to specify the period within which acts constituting corrupt practices should have been committed and that the said period is the choice of the legislature, the argument that if the word "candidate" is understood as defined in Section 79(b) of the Act for the said purpose, one would be in a position to resort to all sorts of prohibited acts before submission of his nomination to reap its benefits after submitting nomination, is one to be addressed by the legislature. Similarly, since the petitioner has no case that the respondent has circulated the video of the speech rendered by Smt.Grace Anto in social media for canvassing votes on religious lines, it is unnecessary to examine the argument that if the word "candidate" contained in Section 79(b) is adopted for deciding issues relating to corrupt practice in this era of information technology, people would be in a position to make objectionable speeches before submission of the nomination to reap its benefits after submission of nomination by circulating the same in social media.

36. In the light of the discussions aforesaid, I hold that the speech stated to have been rendered by the wife of the respondent on 01.02.2019 would not constitute a ground to seek a declaration that the election of the returned candidate is void, even if the said speech was one made with the knowledge and consent of the respondent and even if it would amount to corrupt practice in terms of Sections 123 (2) and 123 (3) of the Act. The issue is accordingly answered against the petitioner.

37. Insofar as issue Nos. 1 and 2 are found against the petitioner, it is unnecessary to consider the remaining issues.

In the result, the election petition is dismissed.

ds 18.11.2020

Sd/-

P.B.SURESH KUMAR

JUDGE

APPENDIX

PETITIONER'S/S EXHIBITS:

ANNEXURE A	NOTIFICATION NO. 576/EXIT/2019/SDR-VOL. I DATED 7TH APRIL, 2019 DOWNLOADED FROM THE WEBSITE OF THE ELECTION COMMISSION OF INDIA.
ANNEXURE B	AFFIDAVIT SUBMITTED BY THE RESPONDENT BEFORE THE RETURNING OFFICER FOR THE ELECTION 2019 AS DOWNLOADED FROM THE WEBSITE OF THE ELECTION COMMISSION OF INDIA.
ANNEXURE C	INSPECTION REPORT DATED 15/12/2018 PREPARED BY THE INSPECTING OFFICER/UZHAVOOR UNIT INSPECTOR, ASSISTANT REGISTRAR (J) OFFICE, MEENACHIL GIVEN TO THE PETITIONER.
ANNEXURE D	AFFIDAVIT DATED 20/03/2014 SUBMITTED BY THE RESPONDENT BEFORE THE RETURNING OFFICER OF PATHANAMTHITTA LOK

	SABHA CONSTITUENCY WHICH IS DOWNLOADED FROM THE WEBSITE OF ELECTION COMMISSION OF INDIA.
ANNEXURE E	THE COMPACT DISC CONTAINING THE NEWS, SURVEY REPORT AND DISCUSSION BROADCASTED BY THE ASSISTANT TV CHANNEL ON 13/04/2019 AND DOWNLOADED FROM 'YOUTUBE' ON 01/07/2019.
ANNEXURE F	RELEVANT CONTENTS OF THE SURVEYS, NEWS AND DISCUSSION EXTRACTED FROM ANNEUXRE E AND TYPED OUT IN MALAYALAM.
ANNEXURE G	TRUE AND CORRECT ENGLISH TRANSLATION OF ANNEXURE F.
ANNEXURE H	COMPACT DISC CONTAINING EPISODE OF 'COVER STORY' PREPARED BY SINDHU SURYAKUMAR, BROADCASTED BY THE ASIANET NEWS TV CHANNEL ON 13/04/2019 AND DOWNLOADED FROM 'YOUTUBE' ON 01/07/2019.
ANNEXURE I	TYPED MALAYALAM VERSION OF RELEVANT CONTENTS OF IN ANNEXURE H.
ANNEXURE J	TRUE AND CORRECT ENGLISH TRANSLATION OF ANNEXURE I.
ANNEXURE K	COMPACT DISC CONTAINING SPEECH MADE BY MRS. GRACE ANTO AND DOWNLOADED FROM 'YOUTUBE' ON 01/07/2019.
ANNEXURE L	TYPED MALAYALAM VERSION OF CONTENTS INCLUDED IN ANNEXURE K.
ANNEXURE M	TRUE AND CORRECT ENGLISH TRANSLATION OF ANNEXURE L.
ANNEXURE N	RECEIPT NO. 227640 DATED 04/07/2019 EVIDENCING THE DEPOSIT OF RS. 2000/- AS SECURITY BEFORE THIS HON'BLE COURT.
ANNEXURE O	ENGLISH TRANSLATION OF RELEVANT PORTION OF ANNEXURE C.
ANNEXURE P	INSPECTION REPORT DATED 15/12/2018 PREPARED BY THE INSPECTING OFFICER RELATING TO POONJAR SERVICE CO-OPERATIVE BANK ALONG WITH LETTER DATED 01/02/2019 FROM THE PUBLIC INFORMATION OFFICER TO MR. CYRIAC LUKOSE.
ANNEXURE Q	FULL TEXT (ENTIRE) ENGLISH TRANSLATION OF ANNEXURE C AND F DOCUMENT.
EXHIBIT A2	PHOTOGRAPH.
EXHIBIT A3	DEGREE IN OS NO.52/15.
EXHIBIT A4	MALAYALA MANORAMA DAILY DATED 01/02/2019.
EXHIBIT A5	MALAYALA MANORAMA DAILY DATED 02/02/2019.
EXHIBIT A6	MALAYALA MANORAMA DAILY DATED 03/02/2019.
EXHIBIT A7	MALAYALA MANORAMA DAILY DATED 04/02/2019.
EXHIBIT A8	MALAYALA MANORAMA DAILY DATED 05/02/2019.

RESPONDENT'S/S EXHIBITS:

EXHIBIT X1	APPLICATION BY PRESIDENT OF IPC CENTRE.
EXHIBIT X1(A)	APPLICATION FOR LICENCE. EXHIBIT X1(B) NOTICE.
EXHIBIT X1(C)	AFFIDAVIT.
EXHIBIT X2	REGISTER MAINTAINED IN THE OFFICE OF THE DEPUTY SUPERINTENDENT OF POLICE (MARKED AND RETD.)
EXHIBIT X2(A)	COPY OF PAGE NO.99 OF EXHIBIT X2. EXHIBIT X3 LICENCE.
EXHIBIT X4	MINUTE BOOK OF THE PRAYER CENTRE FOR THE YEAR 2018-19.
EXHIBIT X4(A)	PAGES 142 TO 144 OF THE MINUTE BOOK EXHIBIT X4.

EXHIBIT X4(B)	PAGES 150-152 OF THE MINUTE BOOK EXHIBIT X4.
EXHIBIT X5	MALAYALA MANORAMA DAILY DATED 26/01/2019.
EXHIBIT X5(A)	RELEVANT PORTION OF THE ADVERTISEMENT IN MALAYALA MANORAMA DAILY DATED 26/01/2019.
EXHIBIT X6	MALAYALA MANORAMA DAILY DATED 01/01/2019.
EXHIBIT X6(A)	NEWS ITEM IN EXHIBIT X6.
EXHIBIT X7	MALAYALA MANORAMA DAILY DATED 10/01/2019.
EXHIBIT X7(A)	NEWS ITEM IN EXHIBIT X7.
EXHIBIT X8	MALAYALA MANORAMA DAILY DATED 15/01/2019.
EXHIBIT X8(A)	NEWS ITEM IN EXHIBIT X8.
EXHIBIT X9	MALAYALA MANORAMA DAILY DATED 17/01/2019.
EXHIBIT X9(A)	NEWS ITEM IN EXHIBIT X9.
EXHIBIT X10	MALAYALA MANORAMA DAILY DATED 18/01/2019.
EXHIBIT X10(A)	NEWS ITEM IN EXHIBIT X10.
EXHIBIT X10(B)	NEWS ITEM IN EXHIBIT X10.
EXHIBIT X11	MALAYALA MANORAMA DAILY DATED 19/01/2019.
EXHIBIT X11(A)	NEWS ITEM IN EXHIBIT X11.
EXHIBIT X12	MALAYALA MANORAMA DAILY DATED 21/01/2019.
EXHIBIT X12(A)	NEWS ITEM IN EXHIBIT X12.
EXHIBIT X12(B)	NEWS ITEM IN EXHIBIT X12.
EXHIBIT X12(C)	NEWS ITEM IN EXHIBIT X12.
EXHIBIT X13.	MALAYALA MANORAMA DAILY DATED 22/01/2019.
EXHIBIT X13(A)	NEWS ITEM IN EXHIBIT X13.
EXHIBIT X14	MALAYALA MANORAMA DAILY DATED 23/01/2019.
EXHIBIT X14(A)	NEWS ITEM IN EXHIBIT X14.
EXHIBIT X15	MALAYALA MANORAMA DAILY DATED 24/01/2019.
EXHIBIT X15(A)	NEWS ITEM IN EXHIBIT X15. EXHIBIT X15(B) NEWS ITEM IN EXHIBIT X15.
EXHIBIT X16	MALAYALA MANORAMA DAILY DATED 25/01/2019.
EXHIBIT X16(A)	NEWS ITEM IN EXHIBIT X16.
EXHIBIT X17	MALAYALA MANORAMA DAILY DATED 26/01/2019.
EXHIBIT X17(A)	NEWS ITEM IN EXHIBIT X17.
EXHIBIT X17(B)	NEWS ITEM IN EXHIBIT X17.
EXHIBIT X17(C)	NEWS ITEM IN EXHIBIT X17.
EXHIBIT X18	MALAYALA MANORAMA DAILY DATED 29/01/2019.
EXHIBIT X18(A)	NEWS ITEM IN EXHIBIT X18.
EXHIBIT X19	MALAYALA MANORAMA DAILY DATED 30/01/2019.
EXHIBIT X19(A)	NEWS ITEM IN EXHIBIT X19.
EXHIBIT X19(B)	NEWS ITEM IN EXHIBIT X19.
EXHIBIT X19(C)	NEWS ITEM IN EXHIBIT X19.
EXHIBIT X20	MALAYALA MANORAMA DAILY DATED 31/01/2019.

EXHIBIT X20(A)	NEWS ITEM IN EXHIBIT X20.
EXHIBIT X20(B)	NEWS ITEM IN EXHIBIT X20.
EXHIBIT X21	MALAYALA MANORAMA DAILY DATED 01/02/2019.
EXHIBIT X21(A)	NEWS ITEM IN EXHIBIT X21.
EXHIBIT X22	MALAYALA MANORAMA DAILY DATED 02/02/2019.
EXHIBIT X22(A)	NEWS ITEM IN EXHIBIT X22.
EXHIBIT X23	MALAYALA MANORAMA DAILY DATED 03/02/2019.
EXHIBIT X23(A)	NEWS ITEM IN EXHIBIT X23.
EXHIBIT X24	MALAYALA MANORAMA DAILY DATED 04/02/2019.
EXHIBIT X24(A)	NEWS ITEM IN EXHIBIT X24.
EXHIBIT X25	MALAYALA MANORAMA DAILY DATED 05/02/2019.
EXHIBIT X25(A)	NEWS ITEM IN EXHIBIT X25.
EXHIBIT X26	MALAYALA MANORAMA DAILY DATED 25/08/2019.
EXHIBIT X27	MALAYALA MANORAMA DAILY DATED 12/10/2019.

Uploaded by Dte. of Printing at Government of India Press, Ring Road, Mayapuri, New Delhi-110064
and Published by the Controller of Publications, Delhi-110054.